RENDERED: May 8, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-2790-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE ROBERT W. McGINNIS, JUDGE
ACTION NO. 97-CR-057

BILLY A. JETT — APPELLEE

OPINION
REVERSING AND REMANDING

* * *

BEFORE: GARDNER, JOHNSON, AND MILLER, JUDGES.

JOHNSON, JUDGE: This is an appeal by the Commonwealth of Kentucky from an order of the Harrison Circuit Court that granted the motion of Billy A. Jett (Jett) to dismiss a charge of trafficking in a controlled substance within 1,000 yards of a school on double jeopardy grounds. We reverse and remand.

In May 1997, in conjunction with a state police investigation, Jett sold a confidential informant 30 pills of diazepam, a Schedule IV substance, and 16 pills of phenobarbital, a Schedule III substance. The grand jury indicted Jett as follows: Count I - trafficking in a controlled substance

(diazepam) within 1,000 yards of a school in violation of Kentucky Revised Statutes (KRS) 218A.1411; and Count II - second-degree trafficking in a controlled substance (phenobarbital) in violation of KRS 218A.1413. Prior to trial, Jett filed two motions to dismiss Count II on double jeopardy grounds. Both motions were denied and the case proceeded to trial. Following the swearing of the jury and the presentation of the Commonwealth's case, the trial court, upon renewal of Jett's motion, dismissed Count I.[1] Jett was convicted on Count II and received a one-year prison sentence. The Commonwealth challenges the dismissal of Count I and argues that if its appeal is successful it is entitled to retry Jett.

Jett argues that this appeal is not properly before this Court and that jurisdiction resides before the Supreme Court. We are aware that the Commonwealth may not appeal from a judgment of acquittal in a criminal case other than for the purpose of securing a certification of law, Ky. Const. § 115, and Commonwealth appeals for a certification of law must be made directly to the Supreme Court. Thompson v Commonwealth, Ky., 652 S.W.2d 78 (1983). However, the dismissal of Count I was not a judgment of acquittal. The issue before the trial court was a motion to dismiss on double jeopardy grounds, not a motion for a directed verdict of acquittal, and the trial court did not

[1] Though Jett sought dismissal of Count II and both charges were Class D felonies, the trial court instead dismissed Count I because it was the "less serious" of the two charges. See Jones v. Commonwealth, Ky., 756 S.W.2d 462, 463 (1988).

purport to enter a judgment of acquittal. In fact, the trial court expressed its doubts about the state of the law and encouraged the Commonwealth to appeal the issue. Jett has failed to cite any authority to support his position that a dismissal of an indictment at mid-trial on erroneous double jeopardy grounds constitutes a judgment of acquittal. This appeal is properly before this Court.

The Commonwealth argues that the trial court committed error in dismissing Count I of the indictment. The issue of double jeopardy in a single drug transaction involving two separate drug schedules was addressed in Kroth v. Commonwealth, Ky., 737 S.W.2d 680 (1987). In Kroth, the defendant was convicted of, inter alia, one count of possession with intent to sell a Schedule III substance and one count of possession with intent to sell a Schedule IV substance. The Supreme Court held that the multiple convictions did not violate double jeopardy principles. The Court reasoned that the two counts violated separate and distinct statutory provisions, namely, those statutory provisions which stated the differences between Schedule III (KRS 218A.080) and Schedule IV (218A.100) types of controlled substances. Kroth at 681. Kroth established the principle that even if only one transaction is involved, it is proper to convict a defendant of multiple offenses if the drugs involved are comprised of distinct schedule types. Kroth is directly in point with this case. As in Kroth, Jett, though

engaged in a single transaction, was charged with multiple offenses because the drugs were scheduled differently.

Jett concedes that Kroth has never been overruled, but argues that its authority has been severely limited and perhaps de facto overruled by subsequent decisions. This view has some merit considering that Ingram v. Commonwealth, Ky., 801 S.W.2d 321 (1990), overruled by Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996), adopted a single transaction/compound consequences test for double jeopardy analysis. However, the impact of Ingram and its progeny on Kroth is academic. The decision in Burge was final on June 16, 1997, well before Jett's August 28, 1997 trial date. Burge overruled Ingram and readopted the test established in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932). Under the Blockburger test, double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct as long as each statute requires proof of an additional fact which the other does not. Alternatively stated, for there not to be double jeopardy a charged offense cannot be a lesser-included offense of another charged offense. Count I, trafficking in a controlled substance in or near a school, is codified in KRS 218A.1411. This statute provides in pertinent part as follows:

> Any person who unlawfully traffics in a controlled substance classified in Schedule[][2] . . . IV . . . in any building

[2] KRS 218A.1411 also prohibits the selling of Schedules I, II, III, and V within 1000 yards of a school.

> used primarily for classroom instruction in a school or on any premises located within one thousand (1,000) yards of any school building used primarily for classroom instruction shall be guilty of a Class D felony.

Count II, trafficking in a controlled substance in the second degree, is codified in KRS 218A.1413. This statute provides in pertinent part:

> (1) A person is guilty of trafficking in a controlled substance in the second degree when:
>
> (a) He knowingly and unlawfully traffics in a . . . controlled substance classified in Schedule III; . . .
>
> (2) Any person who violates the provisions of subsection (1) of this section shall:
>
> (a) For the first offense be guilty of a Class D felony.

Count I contains the additional element, not included in Count II, of selling a Schedule IV controlled substance.[3] Similarly, Count II contains the element of trafficking in a Schedule III substance, an element not contained in Count I. The Blockburger rule does not proscribe convicting a defendant under both KRS 218A.1411 and KRS 218A.1413 for two drugs classified under distinct schedules. To the contrary, Kroth, supra, enunciates this interpretation and permits the Commonwealth to bring multiple charges if the drugs fall under separate schedules. Jett was not charged in violation of multiple punishment double jeopardy principles and the trial court erred

[3] Count I also includes, of course, the additional element of selling within 1000 yards of a school building.

when it dismissed Count I following the presentation of the Commonwealth's case.

The final issue is whether, on remand, the Commonwealth is entitled to retry Jett on Count I. A defendant cannot be tried twice for the same offense. Ky. Const. § 13; U.S. Const. amend. V. A successful claim of double jeopardy will bar a retrial on the charge. See Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Jeopardy attaches once a jury is sworn. Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). However, where a defendant successfully seeks to avoid trial prior to its conclusion by a motion to dismiss, the double jeopardy clause is not offended by a second prosecution; such a motion is deemed to be a deliberate election by the defendant to forego his valued right to have his guilt or innocence determined before the first trier of fact. United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978). The double jeopardy clause does not relieve a defendant from the consequences of his voluntary choice. Id. If the trial fails other than on the merits, and the accused does not seasonably object to the dismissal, a second trial for the same offense does not constitute double jeopardy. Armine v. Tines, 131 F.2d 827 (10th Cir. 1942); C.J.S. Criminal Law § 227. A subsequent prosecution is not barred by a former prosecution if the defendant expressly consents to the termination. KRS 505.030(4)(a).

In the case at bar, the dismissal was upon the motion of Jett and was not on the merits of his guilt or innocence by the trier of fact. Rather, the dismissal was based upon the trial court's misapplication of the multiple prosecution double jeopardy rules and the dismissal was expressly consented to by Jett. Under these circumstances the double jeopardy rules do not prevent the Commonwealth from retrying Jett on Count I.

We reverse the dismissal of Count I of the indictment against Jett and remand the case to the trial court for further proceedings consistent with this Opinion.

GARDNER, JUDGE, CONCURS.

MILLER, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

MILLER, JUDGE, DISSENTING. I respectfully dissent. I am of the opinion that double jeopardy prohibits fracturing a single course of conduct into multiple crimes. I deem my position to be no offense to Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

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